BORA LASKIN LAW LIBRARY
3 1761 10640261 3

UNIVERSITY OF TORONTO
FACULTY OF LAW

FAMILY LAW

Cases and Materials

Volume I

Brenda Cossman
Faculty of Law
University of Toronto

2022-2023

* * *

These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

KE
538.5
.C67
2022
v.1 c.1

BORA LASKIN LAW LIBRARY
SEP 02 2022
FACULTY OF LAW
UNIVERSITY OF TORONTO

BORA LASKIN LAW LIBRARY
SEP 02 2022
FACULTY OF LAW
UNIVERSITY OF TORONTO

FAMILY LAW

Cases and Materials

Volume I

Brenda Cossman
Faculty of Law
University of Toronto

2022-2023

* * *

These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

https://archive.org/details/familylawcasesma01coss_10

FAMILY LAW

TABLE OF CONTENTS
Volume I

I. INTRODUCTION: THE FAMILY AND FAMILY LAW

A. The Family: Definitions and Demographics

Margrit Eichler, "Beyond the Monolithic Bias in Family Literature," *Families in Canada Today* (Toronto: Gage, 1983) at 3 1
Vanier Institute of the Family, "Definitions of Family," *Profiling Canada's Families* (1994) at 10-11 3
Note: Statistics Canada's Definitions of the Family 4
Vanier Institute of the Family, *Profiling Canada's Families IV* (2010) at xi-xiii, ... 5
Bruce Campion-Smith, "Canada has more same-sex couples, one-person families, census Shows", Toronto Star, August 2, 2017 7
Vanier Institute of the Family, "Facts and Stats: Indigenous Families in Canada" June 20, 2017 10
Pamela Cross, "Why do so few Indigenous Women engage with the family law system?" January 23, 2020 11
FTP Ad Hoc Working Group on Family Violence, "Making the Links in Family Violence Cases" (Justice Canada, 2013) at 3-5 (vol 1) and 5-15 (vol 2) 13

B. Legal Regulation of the Family

(a) Federalism/Jurisdiction

Peter Hogg, *Constitutional Law of Canada* (1985) at 533-534 18
Constitution Act, Section 35: Rights of the Aboriginal Peoples of Canada 18
Beaver v Hill, 2019 ONCA 520 19

(b) Processes

Amanda Jerome, "Ontario Unified Family Court proposal calls for province-wide expansion by 2025" *The Lawyer's Daily* (September 25, 2017) 20
John-Paul Boyd, "Collaborative Settlement", *Vanier Institute of the Family* (Vol. 45, No. 3) 21

(c) Family Violence

Note: A vs. A 2022 ONSC 1303 25

(d) The Crisis of Access to Justice

Final Report of the Family Justice Working Group: "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) at 1-2, 5-9, 11-20 27

II. MARRIAGE AND NULLITY

A. The Significance of Marriage

(a) Demographics of Marriage and Other Intimate Relationships

Anne Milan, *Marital Status: Overview 2011* (Statistics Canada, July 2013) at 1-11 35
Statistics Canada, *Being Married or Common-Law in Canada* (2017) 38
Statistics Canada, *Portrait of Families and Living Arrangements in Canada* (Sept. 2012) at 7-10, 13-14 [extract couples with children and children's living arrangements... 39
Statistics Canada, "Census in Brief: Same-sex Couples in Canada in 2016" (Aug. 2, 2017) ..41
Nathan Battams, "Living Apart, Together" Vanier Institute of the Family, *Fascinating Families* (Issue 60, Dec. 2013) at 1 43
Statistics Canada, *Couples Who Live Apart* (2017) 45

B. Validity of Marriage

(a) Overview

Sir William Blackstone, *Commentaries on the Laws of England* (1765) 46
Hyde v Hyde (1886), 1 LR (P & D) 130 46
H R Hahlo, *Nullity of Marriage in Canada* (1979) at 1-5 46
Berend Hovius and Mary-Jo Maur, Note on Validity of Marriage 47
Canada 150: A century and a half of marriage 48
Russell Alexander, "Why Bother with a Marriage Annulment Instead of Divorce?" 54

(b) Formal Validity: The Ceremonial Requirements for a Valid Marriage

Hassan v Hassan, 2006 ABQB 544 56
Note: *Isse v Said*, 2012 ONSC 1829 58

(c) Opposite Sexes

Note: Same Sex Marriage and Legal Recognition of Same Sex Relationships 58
1. Alternative Mechanisms for Legal Recognition 59
2. Same sex Marriage 60
Halpern v Canada (AG) (2003), 225 DLR (4th) 529 (Ont C.) 61
Note: The Same-Sex Marriage Reference 70
Note: The *Civil Marriage Act* (2005) 71
Note: Conflict of Laws and Bill C-32, An Act to Amend the *Civil Marriage* Act 72

(d) Capacity to Consummate

Gajamugan v Gajamugan (1979), 10 RFL (2d) 280 (Ont SC) 73
Norman v Norman (1979), 9 RFL (2d) 235 (Ont UFC) 75
"Judge refuses to annul unconsummated marriage" (re Falk v Falk), Lawyers Weekly, Oct. 1. 1999 75
Note: *L (KH) v L (G.)* (2003), 231 DLR (4th) 677 (BCCA) 76
Note: *Jomha v Jomha*, 2010 ABQB 135 77
Note: *S.J. v X.J*, 2020 BCSC 1336 77
Geoff McMaster, "Researchers: Abolish marriage consummation as requirement for citizenship" *Phys.org*, October 28, 2019 78
Questions 79

(e) Monogamy

Note: Polygamy 80
Reference re: Section 93 of the Criminal Code of Canada, 2011 BCSC 1588 83
Susan Drummond, "A Marriage of Fear and Xenophobia: Our Criminalization of Polygamy isn't about Protecting Women" *Globe and Mail*, April 6, 2009 96
Jeff Fraser, "Polyamory: Exploring the Ins and Outs of Multiple Partners" *Globe and Mail*, Sept. 21, 2012. 97
J P Boyd, *"The polyamorous family" The Lawyers Daily*, Nov. 10, 2016 99
Note: *BDG v CMB*, 2016 BCPC 97 101
Terry Davidson, "N.L. polyamory parenting decision puts children first, lawyers say" *The Lawyer's Daily*, Wed June 20, 2018 101
"B.C. judge rules that a woman in polyamorous family relationship be named as second mother to child", *Canadian Lawyer Magazine*, May 4, 2021 102
"Five things you need to know about polyamory", *The Canadian Press* (June 2018) 104

(f) Age Requirements for a Valid Marriage

Note 105

(g) Prohibited Degrees of Consanguinity and Affinity

Note 106
"Court annuls marriage between twins separated at birth" *The Guardian*, Jan. 12, 2008 107

(h) Consent as a Requirement for a Valid Marriage

Note 108
(i) Predatory Marriages and Mental Incapacity
Hunt v Worrod, 2017 ONSC 7397 109

Michael McKiernan, "Predatory Marriages," *Canadian Lawyer Magazine* (December 2018) 113

(ii) Duress

S (A) v S (A) (1988), 15 RFL (3d) 433 (Ont UFC) 115
Note: *Kaur v Jhamb*, 2019 BCSC 67 118
Note: *M.A. v B.B.*, 2018 ONSC 4582 118
Note: Forced Marriage and Bill S-7 119
Ashley Csanady, "'Barbaric Cultural Practices' bill to criminalize forced marriage, tackle 'honour killings' passes final vote" *National Post*, June 17, 2015 120

(iii) Limited Purpose Marriage (Immigration Marriages)

Note: *Singla v Singla* (1985), 46 RFL (2d) 235 (NSSC) 121
Grewal v Kaur, 2011 ONSC 1812 123
Note: "Marriage Fraud" and Immigration 127
Nicholas Keung, "Immigration Guide for detecting marriage fraud called 'racist and Offensive'" *Toronto Star*, May 19, 2015 127
Ron Poulton, "Marriage sponsorship refusals ignore cultural nuance" Canadian Lawyer October 24, 2016 128

C. Unmarried Cohabitation

(a) Demographics

Andrew Morrison, "Who Is Family: Cohabitation, Marriage, and the Redefinition of Family", *Canadian Journal of Family Law* (2015) 130
Anne-Marie Ambert, "Cohabitation and Marriage: How are they Related?" (Vanier Institute of the Family, Sept. 2005) 132

(b) Legal Recognition and Regulation of Unmarried Couples

Note on Terminology 137

(i) Definition of Unmarried Cohabitation

Molodowich v Penttinen (1980), 17 RFL (2d) 376 (Ont Dist Ct) 138
M v H, [1999] 2 SCC 3 142
Note: *Campbell v Szoke* (2003), 45 RFL (5th) 261 (Ont SCJ) 148
"Ontario's Divisional Court to rule on whether mistress might win spousal support", *Lawyers Weekly*, Nov. 1. 2002 149
Note: *Stephen v Stawecki* (2006), 32 RFL (6th) 282 (Ont CA) 150
Climans v Latner, 2020 ONCA 554 151
A.P. v. Canada (Citizenship and Immigration), 2020 FC 906 156

(ii) Extension of Rights and Responsibilities of Unmarried Cohabitants

Winnifred Holland, "Cohabitation and Marriage—A Meeting at the Crossroads?" (1990-1991) 7 *CFLQ* 33 160
Miron v Trudel [1995] 2 SCR 418; 163
Note: The Legislative Response to M v H 166
Note: Determining Whether Unmarried Persons are "Spouses" 167
Nova Scotia (Attorney General) v Walsh, [2002] 2 SCR 325 168
Note: Developments in the Law of Unjust Enrichment and Constructive Trusts 182
Note: Legislative Extension of Property Rights to Unmarried Couples 183
Note: Legal Recognition of Unmarried Couples in Quebec; *"Eric v Lola"* and *Walsh* revisited 184
Robert Leckey, "Families in the Eyes of the Law" IRRP (July 2009) at 16-18 [extract on "Form, function and the enduring focus on marriage"] 185

(c) Legal Recognition and Regulation of Non-Conjugal Personal Relationships

"Challenging Couple-ism" Editorial, *National Post*, Sept. 23, 2004 187
Note: Alberta's Adult Interdependent Relationships Act (2003) 188
Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (2001) at xi-xix 189

III. DIVORCE

A. The Social Context of Divorce

Vanier Institute of the Family, *Profiling Canada's Families IV* (2010) at 44-47, 50-51, 64-66 [extracts on divorce and remarriage] 193
Ann Marie Ambert, "Divorce: Facts, Figures, and Consequences" (Vanier Institute of the Family, revised 2009) 200
Family Matters: Being Separated or Divorced in Canada 215

B. Reform of Divorce Law

(a) The Movement to No-Fault Divorce

Dept. Of Justice, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation* (May, 1990) at 1-9 216
Note: Divorce Cases 2010/2011 220
Note: Grounds for Divorce, 2008 221
Note: New *Divorce Act* Amendments, 2021 221

C. Obtaining a Divorce under the 1986 *Divorce Act*

(a) Grounds for Divorce

(i) Living Separate and Apart

Rushton v Rushton (1968), 2 DLR (3d) 25 (BCSC) 224
Dupere v Dupere (1974), 19 RFL 270 (NBQB) 224
Note: Engaging in Sexual Relations after Separation 226
Volcko v Volcko, 2015 NSCA 11 227
Note: *Calvert v Calvert* (1997), 32 OR 281 (Ont Gen Div) 230
Note: Relevance of Date of Separation for Property Division 231
Note: Alternative to Separation as a "No-Fault" Ground for Divorce 231

(ii) Adultery

Mary Ann Glendon, *The Transformation of Family Law* (1989) at 286-287 232
Note: Social Acceptance of Adultery 232
Note: Definition of Adultery ..... 233_TOC_250005
P (SE) v P (DD) 2005 BCSC 1290 233
Notes and Questions 238
"Wife wants divorce for virtual adultery" Ananova, Dec. 25, 2005 238
Note: Proof of Adultery (*d'Entremont v d'Entremont; Burbage v Burbage*) 239

(iii) Cruelty

Note: Test for Cruelty (*Chouinard v Chouinard*) 240
Austin v. Austin (1970), 2 RFL 136 (Sask CA) 240
Gilbert v Gilbert (1980), 18 RF.L (2d) 240 (NS TD) 241
S (JG) v S (WOJ), 2004 BCSC 749 244
Notes 246

(b) Duties and Bars to Proceedings

(i) Condonation, Connivance, Collusion

Christine Davies, *Family Law in Canada* (1986) at 417-437 247

(ii) Inadequate Provision for Child Support

Note 248

(iii) Religious Bars

"Family Lawyers Get Change" *Law Times*, 1990 249